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In The

Supreme Court of the United States

October Term, 1994

RAMONA CONVENT OF THE HOLY NAMES,

Petitioner,

vs.

CITY OF ALHAMBRA, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Three

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LELAND C. DOLLEY, City Attorney
City of Alhambra; and
BURKE, WILLIAMS & SORENSEN
J. ROBERT FLANDRICK*
VIRGINIA R. PESOLA
TIMOTHY D. CREMIN
611 W. Sixth Street, Suite 2500
Los Angeles, California 90017
(213) 236-0600

*Counsel of Record
for Respondent City of Alhambra

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The questions framed by petitioner seriously misstate the facts of this case. The questions are more properly stated below:

1. Does open space zoning of a property constitute a regulatory taking where the zoning permits the property owner to use the property as it has for the past 100 years, as well as for numerous other uses?

2. Can a regulatory taking claim regarding a use protected by the first amendment be decided on summary judgment?

3. Does a different regulatory taking analysis apply where a first amendment protected use is involved?

ADDITIONAL QUESTION PRESENTED

4. Did the State Court of Appeal correctly determine that the inverse condemnation claim was ripe for review?

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BRIEF OF RESPONDENT CITY OF ALHAMBRA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

After the filing of the petition, the California Court of Appeal, on August 17, 1994, issued an alternative writ of mandate to the Los Angeles County Superior Court, consistent with its Order of July 6, 1994 (Petitioner's Appendix H1-3), ordering the Superior Court to vacate its order in Case No. BC057997, and make a new and different order granting the City of Alhambra's motion for judgment on the pleadings, or to show cause on November 16, 1994, why a peremptory writ should not issue. (Respondent's Appendix A1-2.)

JURISDICTION

The Court has no jurisdiction over the fourth question presented by petitioner. (28 USC § 1257; *Banks v. State of California*, 395 U.S. 708 (1969).)

STATEMENT OF THE CASE

A. Factual and Procedural History

Petitioner Ramona Convent of the Holy Names ("Ramona") has operated a Catholic girl's school in Respondent City of Alhambra ("City") since 1889. The school is located on a parcel of land measuring about 19.17 acres owned by Ramona. In 1986, to remedy a deficiency in the amount of open space in Alhambra, the

City's zoning and general plan designation for the subject property, and for school properties generally, were changed from "Multiple Family" (R-3) to "Open Space." Thus, Ramona's entire property now is zoned as open space and is designated as open space under the land use element of the City's general plan.

In the 1987 Whittier earthquake, the school's main building sustained extensive damage. To pay for this major expense Ramona decided to sell 1.97 acres at the northwest corner of the campus, which area had been used as a softball diamond.

Wonder Enterprises, Inc. ("Wonder"), a private developer, obtained an option to purchase the 1.97-acre site, on which it intended to construct 88 senior citizen residential units.

In May 1989, Ramona filed an application for a tentative tract map which would provide for a lot split to divide the property into a 17.2-acre parcel and a 1.97-acre parcel.

The City's planner notified Ramona's engineer the application was incomplete because it lacked a development proposal. They agreed the application would be combined with the senior citizen housing proposal on the 1.97-acre site.

Wonder sought City sponsorship for the project which would have allowed it to build 88 units under a density bonus incentive. The City Council voted not to sponsor the proposed project. Absent such sponsorship, the maximum density would be 59 units. Wonder withdrew its application for the 88-unit project.

Ramona's engineer informed the City that Ramona still wanted to proceed with the processing of its lot split application despite the fact it was unaccompanied by a proposed development project.

At a November 6, 1989 hearing, the planning commission denied Ramona's application. Ramona appealed that determination to the City Council. On January 8, 1990, the City Council denied Ramona's application on the grounds it would not promote the City's goal of open space and was inconsistent with the City's general plan.

On March 23, 1990, Ramona commenced this action by filing a petition for writ of mandate pursuant to California Code of Civil Procedure sections 1085 and 1094.5, combined with damages claims for inverse condemnation and violation of civil rights.

On September 26, 1990, following a hearing, the trial court denied Ramona's petition for a writ of mandate, finding no abuse of discretion in the denial of Ramona's application.

Ramona appealed, contending there was no substantial evidence to support the City's determination that the lot split would be inconsistent with the general plan, and that it had been denied a fair trial before the City Council and the trial court.

On September 4, 1992, the California Court of Appeal affirmed the judgment denying the petition for writ of mandate.[1] The Court held that the City was entitled to

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[1] Ramona did not seek further review by way of a petition for rehearing or for review by the California Supreme Court, and the decision is final. Therefore, no 1.97-acre parcel exists.

deny approval of the lot split application if the design of the proposed subdivision was inconsistent with the applicable general and specific plans. Because the resultant 1.97-acre parcel would have been too small to be conducive to any of the uses permitted for open space, there was no abuse of discretion in the denial of Ramona's application. Because the proposed lot split in fact conflicted with the general plan, the denial of Ramona's due process claim was moot.

As for the remaining third and fourth causes of action, inverse condemnation and violation of civil rights, on June 10, 1991, the City filed a motion in the trial court for summary adjudication. It contended, inter alia, the inverse condemnation claim was not ripe, the open space zoning ordinance did not effect a taking as it did not deny Ramona all use of its property, and if the inverse condemnation claim were improper the civil rights claim must fail as well.

Ramona opposed the motion, arguing the City had failed to cite any evidence to support its assertion the Alhambra open space zoning ordinance did not deprive Ramona of all use of the property.

Ramona submitted a supporting declaration by its financial officer, Sister Marion Patrick. She stated: The 1.97-acre site was vacant and was being used as a baseball field, a use not essential to the school's purpose and which would be accommodated elsewhere. Ramona had been operating for years at a financial deficit and the sale of the 1.97-acre parcel for residential development was the only source of funding to repay the loan required to rebuild the earthquake-damaged structure. If the loan

was not repaid, the existence of Ramona, a Roman Catholic educational institution that had provided academic and religious training to young women for a century, would be jeopardized.

Ramona's opposition papers also included a supporting declaration from a real estate appraiser, James J. Reid, who stated: Most of the uses which were permitted or conditionally permitted within the open space zone, e.g. public parks, flood-control channels and utility substations, were public or quasi-public in nature and of no practical use or value to a private property owner such as Ramona. As for the nonpublic uses which were permitted or conditionally permitted, e.g. agricultural cultivation, burial parks, stables and riding academies, none of those uses was appropriate for the 1.97-acre parcel because of the size, location and/or topography of the site. He was advised Ramona did not require the 1.97-acre parcel for its educational institution. As a result, from a planning perspective, the open space zone provided Ramona with no practical or economic use of said parcel.

The motion for summary adjudication of issues was heard on September 19, 1991. On December 13, 1991, the trial court entered an order granting summary adjudication as to the third and fourth causes of action. It found the inverse condemnation claim was not ripe because Ramona had not pursued all available remedies to develop the use of the property commensurate with the existing permissible uses and further had failed to show that all of the property's beneficial uses were destroyed or prevented by the City's actions. It also found the civil rights claim against the individual defendants, members of the City Council and the city clerk, was barred on the

grounds of immunity. (Petitioner's Appendix, B2-7.) Ramona appealed. (*Id.*, B7.)

On December 20, 1993, the California Court of Appeal held that the case was ripe for adjudication as to all claims, but otherwise affirmed the decision of the trial court.

As to the inverse condemnation claim, the court determined that no regulatory taking had occurred because (1) the 1.97-acre area had always been used for school purposes and could continue to be used as such in the open space zone, and (2) that Ramona was not compelled to sacrifice all economically viable use of the property because (a) the denial of the highest and best use of property does not constitute an unconstitutional taking of property; (b) the preservation of open space amidst populated areas is a legitimate exercise of the police power; (c) the City had not conscripted Ramona to maintain a public park on the property; (d) the City had not prohibited all reasonable use of the property because the open space zoning allows various permitted and conditionally permitted uses on the site, including educational facilities; and (e) Ramona's financial situation is not determinative of whether a taking has occurred. (Petitioner's Appendix, B9-15.)

As to the first amendment issue, the Court of Appeal responded to Ramona's sole argument -- that the City's "*de facto* land grab of the property, directly and adversely affects Ramona Convent's ability to discharge its mission to pass on, through education, religious values to a new

generation" and that it "has no means other [than] proceeds [of] sale of the 1.97 acres to place itself on a financial basis that will ensure its continued operation" -- as follows:

> "The argument fails. There has been no land grab. As discussed above, there has been no taking of the 1.97 acres, which area merely is a portion of Ramona's undivided 19.17-acre parcel.
>
> "Further, the City has not interfered with Ramona's free exercise of religion. Ramona's precarious financial situation stems in part from a natural disaster and not from any action by the City. The City has no First Amendment obligation to rezone a portion of Ramona's property in order to ensure Ramona's solvency." (Petitioner's Appendix, B16.)

The Court of Appeal refused to consider Ramona's claim that it had been deprived of equal protection of the laws by discriminatory spot zoning because Ramona had not pleaded such a claim in the complaint. (Petitioner's Appendix, B15-16.)

On April 13, 1994, the California Supreme Court denied Ramona's petition for review. (Petitioner's Appendix, A1.)

B. Ramona Misstates The Facts

Ramona misstates the actual facts and opinions below, as well as the contents of the pleadings below, including the contents of its own complaint. For example:

1. "On the record, the School Site is the only private property burdened with the 'Open Space' zoning . . . initially". After Ramona objected, "the City added a few elementary school sites to the zone." Petition, p. 5, n. 2.

In the 1986 general plan update, the open space zone included Ramona's property, as well as other parochial schools and churches, several public utility properties and private railroad property. (CT 320.)

2. "Because this case was scuttled in a dispositive pretrial motion, the record was not fully developed on this issue [of spot zoning]." Petition, p. 5, n. 2.

The reason the issue of spot zoning was not addressed in the lower courts was because Ramona's complaint contained no such allegation. (Petitioner's Appendix, B15-16.)

3. Ramona claims that the uses permitted by the City's open space zone are not permitted by California Government Code § 65560. Petition, p. 5, n. 3.

This issue was not pleaded in the complaint, was not litigated in the state courts, and is not before this Court.[2]

4. "[T]he Property is restricted to 'recreational open space and school related uses'. This appears to translate into 'public recreational open space such as parks, playgrounds and recreation areas', *private* parks, playgrounds and recreation areas are disallowed." Petition, p. 6, emphasis in original.

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[2] The issue is also one of state law and raises no federal question. (*Agins v. City of Tiburon*, 447 U.S. 255, 259, n. 6 (1980).)

This statement is untrue. Ramona is currently operating, and the open space zoning permits it to continue operating, an educational institution on its property which includes a private softball field used by its students. (Petitioner's Appendix, B2-3, G1-2.)

5. Ramona claims its lot split application was "deemed approved". Petitioner, p. 7, n. 5.

This issue was decided against Ramona by the state trial court and Ramona did not appeal that decision. (Petitioner's Appendix, B4-5 and n. 2, D7-8.) The issue is not before this Court.

6. Ramona's description of the pleadings and evidence regarding its free exercise claim do not comport with the record. Petition, pp. 8-15.

The record demonstrates that Ramona's sole argument regarding a free exercise violation concerned a purported financial burden resulting from the City's actions. (CT 11-12.) The record shows that the parties briefed the issue and presented evidence, and the issue was addressed by the State courts to the extent necessary for the courts to determine that no free exercise violation existed. (CT 292, 340, 428-429, SCT 17-21, OB 37-40, RB 16-20; Petitioner's Appendix, B15-16.)

REASONS WHY THE WRIT SHOULD BE DENIED

INTRODUCTION

While many important regulatory taking questions may remain to be decided, this is not the case to answer them. Even under the most conservative interpretation of

taking jurisprudence, a land use regulation which allows a property owner to continue using that property as it has for the past 100 years does not constitute a taking. That the use is protected by the first amendment does not alter regulatory taking analysis and does not change the rule that no regulatory taking occurs if the property owner is not deprived of economically viable use of its property.

I.

THE COURT OF APPEAL'S DECISION IS CONSISTENT WITH THIS COURT'S REGULATORY TAKING JURISPRUDENCE AS INTERPRETED BY THE FEDERAL COURTS OF APPEALS AND THE CALIFORNIA STATE COURTS

This case presents a garden-variety regulatory taking claim, and nothing else. Ramona's attempts to recast its claim and misfocus this Court's attention by invective and hyperbole is not surprising because the gravamen of its claim, properly rejected by the Court of Appeal, is that the City must grant land use approvals so that Ramona can develop its property to its highest and best use.

The Court of Appeal's decision that no taking occurred because the open space zoning does not deprive Ramona of economically viable use of its property is consonant with a long and unbroken line of judicial precedent from this Court, the lower federal courts and the California state courts.

This Court directly addressed the issue most recently in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 2899-900, 120 L.Ed.2d 798, 813-815 (1992), wherein this Court held that a taking occurs only if a

regulation deprives a property owner of economically beneficial or productive use of its property. In so holding, the Court relied on *Agins v. Tiburon*, 447 U.S. 255 (1980); *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); and *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981). In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), this Court expressed a similar view.

The Ninth Circuit Court of Appeals has followed this well-established precedent (see, e.g., *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 617-618 (9th Cir. 1993); *Lai v. City and County of Honolulu*, 841 F.2d 301 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988); *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 877 (9th Cir.), *cert. denied*, 488 U.S. 827 (1987); *MacLeod v. Santa Clara County*, 749 F.2d 541, 547-548 (9th Cir.), *cert. denied*, 472 U.S. 1009 (1984); *William C. Haas v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir.), *cert. denied*, 445 U.S. 928 (1979); *Pinnock v. International House of Pancakes*, 844 F.Supp. 574, 587-588 (S.D. Cal. 1993)), as have the California state courts (see e.g., *Griffin Development Co. v. City of Oxnard*, 39 Cal.3d 256, 266 (1985); *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 514-515, *cert. denied*, 425 U.S. 904 (1975); *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal.App.3d 1016, 1036, *cert. denied*, ___ U.S. ___, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1991); *Terminals Equipment Co. v. City and County of San Francisco*, 221 Cal.App.3d 234, 242-243 (1990)).

While the term "economically viable use" has yet to be defined with precision (*Outdoor Systems, Inc. v. City of Mesa, supra*, 997 F.2d at 616), this is not the case to do it. This case does not involve the taking of economically viable use or even a significant diminution in value. Ramona is simply trying to recover profits it may have earned if it had been successful in obtaining rezoning and subdivision approval. Similar attempts have been rebuffed consistently by this Court and the lower courts, because a landowner has no constitutional right to develop its property for maximum economic profit or to receive compensation when land use regulations restrict its ability to do so.[3]

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[3] Ramona intimates that a higher standard of scrutiny should be applied to any regulatory taking case that comes before this Court from the California state courts. This suggestion fails to acknowledge that California state court decisions are consistent with the decisions of the federal courts and that California courts have not hesitated to tell state and local governments when they have exceeded their police powers. (E.g., *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal.App.3d 1260, 1267-1269 (1991) [applying *Nollan*]; *Twaine Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal.App.3d 71, 80-92 (1990) [denial of use of parcel]; *Rohn v. City of Visalia*, 214 Cal.App.3d 1463, 1472-1477 (1989) [illegal exaction]; *Elysium Institute, Inc. v. County of Los Angeles*, 232 Cal.App.3d 408 (1991) [equal protection].)

II.

SUMMARY JUDGMENT IS REGULARLY USED TO DECIDE REGULATORY TAKING AND FIRST AMENDMENT CLAIMS

Ramona's assertion that its claims cannot be decided on summary judgment is contrary to well-established federal judicial precedent and raises no important question of law.

Regulatory taking claims of the type alleged here are routinely decided on summary judgment. In *Lake Nacimiento Ranch Co. v. San Luis Obispo County, supra,* 841 F.2d 872, for example, the Ninth Circuit upheld summary judgment where the plaintiff had failed to make a sufficient showing that there was no available beneficial use under the applicable general plan and zoning ordinance. The Court of Appeals found especially significant the fact that, as here, the land use ordinance incorporated an extensive list of available uses as well as additional uses permitted under a special use permit. (841 F.2d at 877 and n. 3.)

That summary judgment is appropriate to determine a broad spectrum of first amendment claims is demonstrated by cases decided within the last few months. (See, *Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 546 (1994) [first amendment claim regarding validity of statute creating public school district for Hasidic Jewish village adjudicated on summary judgment]; *Peloza v. Capistrano Unified School District,* Los Angeles Daily Journal D.A.R. 10343, 10347, ___ F.3d ___ (July 25, 1994) ["Because the

district court may resolve Peloza's entire case on summary judgment, we do not decide at this time whether his allegations of a conspiracy to violate his constitutional rights under the Establishment and Free Exercise Clauses are sufficient to state a claim under 42 U.S.C. § 1985(3)"]; *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994) [claim by police officer that city violated officer's first amendment rights in connection with an investigation of whether officer's religious views were having an impermissible effect on his on-duty police performance decided on summary judgment in city's favor]; *Tipton v. University of Hawaii*, 15 F.3d 922 (9th Cir. 1994) [first amendment challenge to constitutionality of university's policy of not funding student organization activities intended to or actually promoting particular religious points of view properly decided on summary judgment].) In addition, summary judgment was granted for a city in a regulatory taking case involving a first amendment use just a year ago in *Outdoor Systems, Inc. v. City of Mesa, supra*, 997 F.2d 604.

Ramona cites three cases in support of its argument that a free exercise claim may only be considered in a plenary hearing, *Yonkers Racing Court v. City of Yonkers*, 858 F.2d 855, (2nd Cir. 1988) *cert. denied* 489 U.S. 1077 (1989); *Order of Friars v. Denver Urban Renewal Authority*, 527 P.2d 804 (Colo. 1974), and *Pillar of Fire Church v. Denver Urban Renewal Authority*, 509 P.2d 1250 (Colo. 1973).) *Yonkers* involved direct condemnation of a portion of a seminary where the court assumed that the taking would impermissably burden free exercise rights. (858 F.2d at 877.) *Order of Friars* and *Pillar of Fire* also involved

direct condemnation of property used for religious purposes. These cases are inapposite because the City is not condemning property used for religious purposes and no impermissable burden on free exercise exists.

Ramona argues that the Court of Appeal improperly affirmed summary adjudication of its free exercise claim because the trial court did not directly address the issue in its decision, and the City failed to brief the issue. This argument is without substantive merit and is based on a misrepresentation of the record.

Ramona raised the free exercise issue on appeal as an assignment of error and briefed the issue. (OB 36-40, RB 16-20.) Because the issue was raised and briefed by appellant, the Court of Appeal decided the issue, as it is empowered to do. (See, *Tan v. California Federal Savings & Loan Assn.*, 140 Cal.App.3d 800, 811 (1983) [the general rule is that a court of appeal will notice only those assignments pointed out in the brief of an appellant; however, a reviewing court is empowered to decide a case on any proper points or theories, whether urged by counsel or not].)

Ramona fails to explain the relevance of its view that the quantity and quality of the City's briefing of the issue in the state courts was deficient. Moreover, the record demonstrates that the issue was briefed by the City to the extent necessary to address Ramona's claim.

The City's motion for summary adjudication included both the inverse condemnation and free exercise claims. The City argued that the inverse claim was not ripe; the open space zoning did not deny Ramona all economically viable use of the property because certain

uses under the open space zone were viable (particularly, educational uses which were currently conducted on the property), and the free exercise claim should be dismissed if the court found that the zoning of the property did not eliminate all economically viable use of the property. (CT 292.) The City presented to the court a copy of the open space ordinance which listed, among others, the following uses: educational institutions, churches, agricultural and horticultural cultivation, stables and riding academies, libraries, museums, outdoor nursery storage, golf course and country clubs. (CT 329.)

In its opposition to the summary adjudication motion, Ramona presented two declarations that it claimed created a triable issue of fact -- a two-page declaration of a real estate appraiser which only evaluated the viability of the uses as applied to a 1.97 acre portion of the parcel and concluded that all uses of this portion of the property, *except school, church and golf course uses,* were of no practical use or economic value (SCT 33), and a declaration of the school's financial officer which contained a single statement regarding the actions of the City which burden the school's free exercise: "Prohibiting the subdivision and the subsequent sale of the 1.97 parcel for residential development removes the only source of funding we have for repaying the loan required to rebuild the earthquake damaged structure" (CT 340).

Ramona's opposition papers addressed the free exercise question by stating the issue was simply whether the open space zoning as applied to the property is an infringement of free exercise because the only source of funding for the school is sale of a portion of its property and that the appraiser's declaration created an issue of

disputed fact as to whether there are viable uses of the property under the open space zoning. (SCT 17-21.)

In its reply papers, the City pointed out that educational and church uses are permitted under the open space zone and the property is currently being used for that purpose. (CT 423-425.) The City also argued that Ramona had not presented any facts establishing a burden on the exercise of its religion due to City action because the "burden" it showed, if any, was the reduction in value of the property which Petitioner desired to sell to support the school. (CT 428-429.)

On appeal, Ramona argued, *for the first time*, that the free exercise claim required a plenary hearing. (OB 40-44.) On appeal, the only further articulation of City action which purportedly burdened Ramona's free exercise rights was the statement that its "religious mission [is] threatened by City's de facto confiscation of property". (OB 38.)

The procedure followed by the state courts conformed in all respects to applicable law. Ramona's focus on a purported first amendment violation is an attempted end run around its meritless taking claim. No question worthy of this Court's consideration is presented.

III.

A FIRST AMENDMENT USE DOES NOT CHANGE THE TEST FOR DETERMINING WHETHER A REGULATORY TAKING HAS OCCURRED

Ramona argues that because Ramona Convent is a parochial school, the usual regulatory taking test does not

apply because the burden is on the City to justify open space zoning. Not so.

In *Dolan v. City of Tigard*, ___ U.S. ___, 62 USLW 4576 (1994), relied on by Ramona, this Court held a government-required dedication of property requires a city to justify the quantity of the dedication. In distinguishing dedication requirements from zoning, this Court said: "In evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, e.g. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)." (483 U.S. at 836.)[4]

Ramona also argues a heightened level of scrutiny is required under the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb *et seq.*). Ramona's argument is meritless for both procedural and substantive reasons.

In reviewing judgments of state courts under 28 U.S.C. § 1257, this Court does not consider claims not raised or addressed below, with "very rare exceptions". (*Yee v. City of Escondido*, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153, 169 (1992).) The 1993 statute was not pleaded in Ramona's complaint and was not addressed by the state courts. Moreover, this case does not present a "very rare exception". The burden Ramona claims is a financial burden, not a burden on religious belief or acts.

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[4] Ramona's reliance on this Court's grant of certiorari in *Ehrlich v. Culver City, California*, ___ U.S. ___, 62 USLW 3860 (1994) is similarly misplaced. While *Ehrlich* contained a first amendment claim, it involved an exaction, not rezoning, and this Court vacated and remanded in light of *Dolan*, which did not address any first amendment claim.

The compelling interest test reinstated by the Act only applies to neutral laws which "substantially burden" free exercise of religion. (42 U.S.C. § 2000bb(b)(1).) Therefore, a claim that a regulation violates the Act must first show that the regulation "substantially burdens" the exercise of religion. Ramona cannot make this threshold showing.

Contrary to Ramona's assertion that open space zoning substantially burdens the dissemination of religious ideas, the right of parents to direct the education of their children, and the communication of religious beliefs, the zoning specifically permits religious and educational institutions. Therefore, Ramona is able to continue and expand, if it chooses, its religious and educational activities on its property.

The State courts' rejection of the claim is consistent with this Court's decisions rejecting free exercise claims based on the economic burden of regulations. (See, e.g., *Swaggart v. California Equalization Board*, 493 U.S. 397 (1990) [sales tax on religious materials does not impose a constitutionally significant burden on religious practices or beliefs]; *Hernandez v. Commissioner*, 490 U.S. 680 (1989) [tax deduction disallowance reduces money available to religious organization but does not constitute a substantial burden on free exercise rights]; *Braunfeld v. Brown*, 36 U.S. 599 (1961) [Sunday closing laws making practice of religion more expensive did not violate free exercise rights].) This analysis of financial burdens on the exercise of religion is similar to the analysis of "incidental effects" of government on religious practice for which the government is not required to bring forward a compelling justification. (*Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 450-451 (1988).)

The specific issue of the financial burden of zoning regulations on religious institutions has been addressed in several federal Court of Appeals decisions. (See, e.g., *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) [denial of permit to build office tower on church property does not burden exercise of religion]; *Messiah Baptist Church v. City of Jefferson*, 859 F.2d 820 (10th Cir. 1988), *cert denied*, 490 U.S. 1005 (1989) [requirement of special use permit for church did not infringe on religious freedom because it only imposed financial burden on exercise of religion and did not regulate religious beliefs or conduct]; *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied* 464 U.S. 815 (1983) [denial of permit to build church in residential zone did not infringe on religious freedom].)

Consistent with the decisions of this Court and the federal courts of appeals, the Court of Appeal held that the open space zoning did not substantially burden Ramona's free exercise of religion. To the extent the religious freedom claim was based upon the open space zoning as a taking, the finding of the court that there was no taking defeated the claim. To the extent the claim of interference with religion was based on the reduction in value of the property under the open space zoning, the claim was rejected because the financial difficulties of the school did not result from any city action, and the City is not required under the first amendment to rezone Ramona's property to a higher value use in order to ensure Ramona's solvency.

No conflict exists in the courts and no important question is presented.

IV.

THE COURT HAS NO JURISDICTION OVER THE FOURTH QUESTION PRESENTED

Ramona asks this Court to review an issue raised in a separate lawsuit, which issue is currently pending before the California Court of Appeal. (Respondent's Appendix A1-2.) Because there is no final judgment, the Court lacks jurisdiction to review the matter. (28 U.S.C. § 1257; *Banks v. State of California*, 395 U.S. 708 (1969).)

V.

IN THE EVENT THE COURT GRANTS REVIEW, IT SHOULD REVIEW WHETHER THE COURT OF APPEAL CORRECTLY DECIDED THAT THE INVERSE CONDEMNATION CLAIM WAS RIPE

The Court of Appeal determined the inverse condemnation claim was ripe for adjudication because it appeared that the City had identified definitively the uses it would permit on the property (Petitioner's Appendix B9), even though no development permit application had ever been submitted by Ramona. (Wonder's application for development was withdrawn after the City refused to grant a density bonus [Petitioner's Appendix B3].)

This determination seems to be inconsistent with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 187-88 (1985), holding that a rejected development plan and the denial of a variance or similar application is required before a regulatory taking claim is ripe. Accordingly, if this Court grants review, it should determine the ripeness of Ramona's claim.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that this case presents no special and important reasons for review by writ of certiorari and the petition should be denied.

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN
J. ROBERT FLANDRICK

Counsel of Record for Respondent

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

CITY OF ALHAMBRA, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; RAMONA CONVENT OF THE HOLY NAMES, Real Party in Interest.	No. B084886 (Super. Ct. No. 057997) (Kathryn Doi Todd, Judge) **ALTERNATIVE WRIT OF MANDATE**

BY THE COURT:

The petition for writ of mandate, filed June 22, 1994, has been read and considered.

The superior court is required either to:

(a) vacate the order entered on May 4, 1994, in Los Angeles County Superior Court Case No. BC057997, entitled *Ramona Convent of the Holy Names* v. *City of Alhambra, etc., et al.*, and thereafter make a new and different order granting City of Alhambra's motion for judgment on the pleadings, or

(b) in the alternative

SHOW CAUSE before this court in its courtroom at 300 South Spring Street, 3rd Floor, Los Angeles, California, on November 16, 1994 at 9:00 a.m. why a peremptory writ of mandate ordering you to do so should not issue.

Counsel for real party in interest may file and serve opposition on or before September 2, 1994.

Any response shall be filed and served no later than September 15, 1994.

The temporary stay order issued by this court, on July 26, 1994, shall remain in effect pending further order of this court.

By order of this coûrt.

ATTEST my hand and the seal of this court this 17th day of August, 1994.

JOSEPH A. LANE, Clerk

By V. THOMAS
Deputy Clerk